

The Atchison Topeka And Santa Fe

Between San Francisco and Chicago
Via Albuquerque, and Kansas City.

Sneed Comfort and Elegance

Pullman Dining Service Unsurpassed.

Passing through the Grandest Scenery of the West

F. W. Prince, Agent, 641 Market St. San Francisco Cal

Sacramento Saloon

ANDY TODD, Prop.

The best of liquid refreshments always on tap, including imported
and domestic goods.

Good Cigars are a part of our stock.

You never make a mistake at the old corner.

The Eagle Market

Our Meats are the best, if you are not
satisfied with the place you are trading
call on us—Our motto is "The Best."
A pleased patron means a steady customer

The Eagle Market

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF NEVADA,

In and for the County of Ormsby.

Marion W. Buckley, Plaintiff
vs.
Joseph W. Buckley, Defendant.

Action brought in the District Court
of the First Judicial District of the
State of Nevada, Ormsby County, and
the complaint filed in the said county,
in the office of the Clerk of said Dis-
trict Court on the 24 day of December,
A. D. 1905.

THE STATE OF NEVADA SENDS
GREETING TO
JOSEPH W. BUCKLEY,
Defendant.

You are hereby required to appear
in an action brought against you by
the above named Plaintiff, in the Dis-
trict Court of the First Judicial Dis-
trict of the State of Nevada, Ormsby
County, and answer complaint filed
therein within ten days (exclusive of
the day of service) after the service
on you of this Summons is served in
said county, or if served out of said
County, but within the District, twenty
days, in all other cases forty days,
or judgment by default will be taken
against you according to the prayer
of said complaint.

The said action is brought to obtain
the judgment and decree of this court
that the bonds of matrimony hereto-
fore and now existing and uniting you
and said plaintiff to be forever annu-
led and dissolved upon the ground that
at divers times and places since said
marriage you have committed adultery
with one Kate Cottrell, and particu-
larly that from about the 9th day of June
1900 to and including the 13th day
of June, 1900, at the Charing Cross
Hotel in the city of London, Eng-
land, you lived and cohabited with
said Kate Cottrell.

All of which more fully appears
by complaint as filed herein to which
you are hereby referred.

And you are hereby notified that if
you fail to answer the Complaint, the
said Plaintiff will apply to the Court
for the relief herein demanded.

GIVEN under my hand and Seal of the
District Court of the First Judicial
District of the State of Nevada
Ormsby County, this 24 day of Decem-
ber, in the year of our Lord one
thousand nine hundred and five.

H. B. VAN HATTEN, Clerk.

(SEAL).

Geo. W. Keith,
Attorney for Plaintiff.

Notice of Application for Permission to appropriate the Public Waters of the State of Nevada.

Notice is hereby given that on the
12th day of Sept., 1905, in accordance
with Section 23, Chapter XLVI, of the
Statutes of 1905, one Philip V. Mighels
and Frank L. Wildes of Carson,
County of Ormsby and State of Ne-
vada, made application to the State
Engineer of Nevada for permission to
appropriate the public waters of the
State of Nevada. Such application to
be made from Ash Canyon creek at
points in N E 1/4 of S W 1/4 of section
10 T 15 N R 19 E by means of a dam
and headgate and five cubic feet per
second is to be conveyed to points
in N E 1/4 of S W 1/4 of section 11,
T 15 N R 19 E, by means of a flume
and pipe and there used to generate
electrical power. The construction
of said works shall begin before June
1, 1906, and shall be completed on or
before June 1, 1907. The water shall
be actually applied to a beneficial use
on or before June 1, 1908.

Signed:
HENRY THURTELL,
State Engineer.

SCHOOL APPORTIONMENT. STATE OF NEVADA.

Department of Education,
Office of Superintendent of Public In-
struction.

Carson City, Nevada, July 11, 1905
To the School Officers of Nevada:

Following is a statement of the second
semi-annual apportionment of
School Monies for 1905, on the basis
of \$6.90202 per census child:

| Counties | children | Amt. |
|------------|----------|-------------|
| Churchill | 135 | \$ 943.68 |
| Douglas | 317 | 2,215.30 |
| Elko | 1,124 | 7,829.02 |
| Esmeralda | 217 | 1,516.57 |
| Eureka | 389 | 2,719.20 |
| Humboldt | 742 | 5,129.49 |
| Lander | 318 | 2,215.30 |
| Lincoln | 764 | 5,305.54 |
| Lyon | 499 | 3,444.11 |
| Nye | 25 | 172.55 |
| Ormsby | 98 | 676.40 |
| Storey | 98 | 676.40 |
| Washoe | 2,412 | 16,660.26 |
| White Pine | 525 | 3,633.81 |
| Total | 9,430 | \$65,917.61 |

Joe Platt has received samples of
tailor made suits which are, with-
out doubt the finest ever shown in
this city. A number of suits have
already been made and they are per-
fect fits in every case. Get your
measure taken and do it before the
best samples are gone. No guaran-
tees a fit or no pay.

SUPREME COURT DECISION. IN THE SUPREME COURT OF THE STATE OF NEVADA.

Ross Gilling, Executor, and Charles
Gilling, Executor of the Estate of
Martin Gilling, deceased.
Respondents.

Washoe County Bank,
Appellant.
Messrs Goodman and Webb, Dodge and
Parker, Attorneys for Respondent.
Messrs Cheney and Massey, Attor-
neys for Appellant.

OPINION

On March 1, 1893, James Pollock,
his wife Della and Daniel Powell, who
are admitted to have been the owners
at that time, executed to B. U. Stein-
man and C. H. Cummings as trustees,
a trust deed for certain property near
Reno to secure the payment of a
promissory note of the same date given
by the Pollocks and Powell to
Farmers and Mechanics Savings Bank
of Sacramento for \$8,000 and interest.
This deed directed the trustees in
case of default in payment, to sell
the property at Sacramento after giving
notice, to apply the proceeds in
satisfaction of the note and costs of
sale and to pay any excess to the
grantors.

On August 31, 1895, the Pollocks
and Powell executed to Martin Gilling
a mortgage on the same premises for
\$2,082.40, and interest thereon from
that date at eight per cent per annum,
which is sought to be foreclosed in
this action and which specified that
it was given subject to the trust deed.
On February 23, 1897 the Pollocks and
Powell conveyed their interest in the
property to Washoe County Bank for
a stated consideration of \$14,000.00,
which comprised the amount of \$8,-
800, estimated to be due to the Farm-
ers and Mechanics Bank of Sacramen-
to on the note secured by the trust
deed and \$5,200 due from the Pollocks
and Powell to the Washoe County
Bank on unsecured notes which were
surrendered to them. On February
26, 1897, the Farmers' and Mechanics'
Savings Bank commenced suit to re-
cover the amount due on its note stated
at \$8,639.73, and for a foreclosure of
the trust deed and sale to satisfy that
amount against the Pollocks, Powell,
Thomas E. Haydon, Henry Anderson,
John Doe, Richard Roe, Michael Doe,
B. U. Steinman and C. H. Cummings.
Neither Martin Gilling nor the Wash-
oe County Bank were named as par-
ties in the complaint, but both were
served with summons under the fic-
ticious designations of defendants who
were alleged to have some title, claim
or interest which was second and sub-
ordinate to the right of the Farmers'
and Mechanics Bank arising from the
trust deed. On March 8, 1897 Martin
Gilling filed an answer in that action
in which the name of Washoe County
Bank is not mentioned in the title,
body or prayer. It stated that its
allegations were made "in obedience
to summons therein issued and served
upon him and answering the com-
plaint therein." In this answer he
admitted the priority of the claim of
the Farmers and Mechanics Sav-
ings Bank under the trust deed,
thereby avoiding any real issue
with the plaintiff, but he alleged
the execution of the mortgage to him
by the Pollocks and Powell, that other
persons claimed an interest in the
premises which was subsequent to his
mortgage, and he asked, for judgment
against the mortgagors for principal,
interest and attorney fees, for the
usual decree of sale, that the proceeds
be applied first to the satisfaction of
any judgment which Farmers' and
Mechanics Bank might obtain, and
second to the payment of any judg-
ment he might recover, that he have
execution for any deficiency against the
Pollocks and Powell, and that they,
Thomas E. Haydon, Henry Anderson,
B. U. Steinman and C. H. Cummings
and all persons claiming under them
subsequent to the execution of his
mortgage be barred and foreclosed of
all right, claim or equity of redem-
ption.

On March 20, 1897, twelve days after
Gilling filed his answer, Steinman and
Cummings, acting as trustees and af-
ter notice given, sold the property at
the court house door at Sacramento
to the Washoe County Bank for \$9,190
the amount due the Farmers' and
Mechanics Bank on the note secured
by the trust deed and the sum esti-
mated for costs. Over four months
later and on July 1, 1897, Washoe
County Bank filed its answer without
naming Gilling in its title and pre-
faced its averments with the recital
that "as required by summons served
on said Bank and answering said
summons and the complaint filed in
said action" it made its allegations
setting out the sale thereunder and the
deeds from Steinman and Cummings
as trustees and from the Pollocks and
Powell to Washoe County Bank. These
facts, and they controlled the court
later in its decision in that case, do
not purport to be stated against Gil-
ling. But directly after their state-
ment as so alleged in answer to the
complaint, follows an allegation in law,
"that the equities of all the other de-
fendants, including Gilling, were fore-
closed and barred," and a demand for
a decree accordingly against them and
the plaintiff. This answer does not
in any part of it purport to allege as
a cross-complaint or in terms as
against Gilling the sale under the
trust deed by the trustees to Washoe
County Bank, nor does it appear to
have been served upon him. He filed
no demurrer, answer or reply to it
and the record indicates that he offered
no evidence regarding it.

The case came to trial on January
14, 1898. The plaintiff, Farmers' and
Mechanics Savings Bank, and the de-
fendants, Washoe County Bank, Gil-
ling and Anderson, each appeared by
counsel and Haydon in person. It is
stated in the findings that the plaintiff
having before the hearing made and
filed a disclaimer of all interest in
the action, and an admission that

Washoe County Bank had succeeded
to the interest of plaintiff, thereupon
rested. That Martin Gilling offered
and submitted evidence and proof
and thereupon rested and that Henry
Anderson, Washoe County Bank and
the defendants and each of them, hav-
ing submitted evidence and proofs in
support of the issues made by them
in their answers, the case was sub-
mitted to the court. The fair in-
ference from the language and from
the fact that he was first to submit
proofs is that he introduced evidence
to support the allegations of his an-
swer which averred the execution and
non-payment of his mortgage, but that
he did not offer any in relation to
other facts alleged in the answer of
Washoe County Bank. The findings
and decree in that action disposed of
the claims of these other defendants
and found and declared that the sale
and deed made by the trustees was in
accordance with the terms of the
trust deed and that by such sale and
deed all the interest in the property
was conveyed to Washoe County Bank
clear of Gilling's mortgage, and that
the latter was entitled to a judgment
against the Pollocks and Powell for
the amount due on his note but not
to a degree of foreclosure. The find-
ings recite that "defendant Gilling
was made a party to the action and
was duly served with process therein,
and in due time filed his answer to
plaintiff's complaint," but it does not
appear that there was any other ser-
vice upon him, or issue made that
rendered him liable beyond the al-
legations and demands of the complaint,
or that would cut off his right by reason
of the sale by the trustees which did
not take place until after he had filed
his answer. The court found in both
actions that \$8,800.00, estimated to
be the amount due the Farmers' and
Mechanics Bank and notes held by
Washoe County Bank against the
Pollocks and Powell, for \$5,200.00 un-
secured after the execution of the
mortgage to Gilling, constituted the
consideration expressed, at \$14,000.00
for the deed from them to Washoe
County Bank, and that the property
was worth about that sum at the date
of the trustees' sale and the time of
the trial.

A blank space in the decree in the
first action for judgment in the
amount owing by the Pollocks and
Powell to Gilling on his note and
mortgage remains unfilled. The case
now before the Court was brought by
Martin Gilling on June 9, 1902 against
Washoe County Bank as grantee to
foreclose his mortgage so executed
on the premises by the Pollocks and
Powell before they deeded to defend-
ant, and is now prosecuted by the re-
presentatives of his estate. The de-
fendant pleads by way of estoppel
the judgment in the former action and
claims that by it Gilling was, and his
executors are barred and foreclosed
of all right to proceed against Washoe
County Bank. The district court was
of the opinion that in the earlier suit
it did not have jurisdiction to make
the judgment effective in quieting the
title of appellant against Gilling,
and it has now entered a decree of
foreclosure and sale to satisfy his
mortgage, from which this appeal is
taken.

The important questions under the
record and elaborate and interesting
briefs are whether the matters re-
lating to the trustees' sale determi-
ned in the former action were within
the issues as between Gilling and
appellant, and if they were not,
whether he waived the framing of
issues so that he became bound by
the decree. The facts stated in the
complaint of Farmers and Mechanics
Savings Bank averring the execution
of the trust deed were not denied by
any of the parties. The statute, at
least in favor of the plaintiff, raised
denials of the facts alleged in Gil-
ling's answer. These were in regard
to the execution and non-payment of
his mortgage and did not relate to
the trustees' sale which took place
after his answer had been filed, and
therefore, if any issue existed re-
garding this sale it must have been
founded on the answer of the Washoe
County Bank. On its behalf it is
urged that the answers of Gilling
and the Bank made a direct issue of
his right to have the property sold
to pay his debts, but this is dealing
with conclusions and not with facts
upon which issues are based. Gilling
did not raise any issue regarding the
trustees' sale for his only answer was
filed before the sale and before the
answer of the Washoe County Bank
in which it was alleged, and did not
mention the name of the latter.

On behalf of appellant it is urged
that the only pleadings provided or al-
lowed by the Practice Act for the al-
legation of facts are a complaint by
the plaintiff and an answer by a de-
fendant, and that in determining the
rights of co-defendants between them
selves an answer is the only pleading
permissible and that its allegations
are deemed denied by statute, when
it states a cause of action against a
co-defendant, the same as if it relates
new matter against a plaintiff. For
respondent a different view is taken
and it is claimed that under Rose v.
Treadway, 4 Nev., 460, and other
cases cited, that ordinarily the de-
fendants in an action are not as be-
tween themselves adversary parties,
that they become such only when one
files a pleading in the nature of a
cross-complaint seeking affirmative
relief against another, that when this
is done they lose their identity as
defendants and for the purposes of the
cross-complaint assume the rela-
tion of plaintiffs and defendant,
that the one against whom the cross-
complaint is filed is of necessity an-
titled to all the rights of an adver-
sary including that of being served
with, and of having an opportunity of
pleading to the cross-complaint, and
that the statutes having failed to
designate the methods of pleading be-
tween co-defendants equity practice
must be followed. If it be conceded
for the argument that the statute as
claimed for appellant, denies any new

matter which one defendant may al-
lege against a co-defendant and that
no answer or reply thereto is required,
it would still be a dangerous prece-
dent, which we would be reluctant to
establish, to hold that the statute de-
nies for a co-defendant facts not al-
leged against him but stated in the
answer of another defendant to the
complaint, or that an issue would be
raised against a co-defendant by the
mere filing without service of an an-
swer containing new matter alleged
against the complaint of the plaintiff.
The answer of Washoe County Bank
in the former suit not having been
served upon Gilling, and he having
filed no demurrer, answer or reply to
it, which would have been a waiver
of service, we feel constrained to hold
that it raised no issue against him,
and if we concede for the purposes
here that denial by statute without
any pleading in reply is sufficient be-
tween co-defendants, such denial
ought not to become operative before
service. White v. Patton, 87 Cal. 151;
Hunt v. Davis, 10 Ind. 681. To
hold otherwise or establish a different
practice, might cause litigants to suf-
fer a great injustice. An answer to
a complaint ought to be served upon
the plaintiff but if it is not he may
be expecting it, or to secure a de-
fault, he could not obtain judgment
without being aware of it, and would
not be likely to go to trial without
being prepared to meet the statutory
denial in his behalf of any new mat-
ter it alleged. It is different between
co-defendants. Usually their interests
are not adverse, except to the plain-
tiff, and one defendant may not ex-
pect that another defendant will set
up a cause of action and seek a judg-
ment against him, and if he does he
should not be required to watch the
court records as Gilling could have
done for over four months after his
answer was filed to ascertain whether
any of his co-defendants filed a cross-
complaint against him, in order that
he might be prepared to meet it. Un-
til he is warned by service of the
pleading and demand or waives ser-
vice or issue, he ought not to be
bound by any judgment based upon it.

If the Farmers' and Mechanics' Sav-
ings Bank instead of the Washoe
County Bank had bought the property
at the trustees' sale and relied upon
its purchase, necessarily it would have
pleaded the fact by supplemental
complaint, and they would not have
been considered denied by Gilling's
answer to the original complaint, and
without service upon or waiver of
service by him, a valid judgment based
upon facts occurring after he had
been served with the original com-
plaint and filed his answer thereto,
could not have been taken by default
against him. In Mitchell v. Mitchell,
79 P. 50, 28 Nev., we set aside the
action of the district court whereby
it granted a plaintiff relief not de-
manded in the complaint served upon
the defendant. That was pursuant to
statute, but there is no more reason
for holding a defendant liable on a
judgment based on a cross-complaint
or pleading of a co-defendant without
service, than on one resting on a com-
plaint of a plaintiff which has not
been served. In neither case should
the rights of the parties be concluded
without service or a waiver thereof.

It is said that service of the answer
of the Washoe County Bank will be
presumed, if necessary to support the
judgment. "The judgment roll and
the papers" in the first case were
introduced on the trial and are
brought here in the statement on ap-
peal, and the case rests upon them
and not upon presumptions, and the
burden of establishing estoppel is up-
on the defendant. If any admission
or affidavit of service was made it
should be among those papers but none
appears and therefore we must con-
clude that the answer was not served.

The return of the Sheriff and recital
in the findings indicate that Gilling
was served with summons, and the
findings state that in due time he ap-
peared and filed his answer to the
complaint. Under these circumstan-
ces further service will not be pre-
sumed. Galpin v. Page, 18 Wall, 366.

Beyond that appellants answer in
the present case does not allege that
the answer of Washoe County Bank
was served upon Gilling in the other
suit, and is defective in this vital re-
spect. Its allegations follow the facts
disclosed by the record of the former
action which show no service, and
it states the conclusion that by the
filing of the former answer an issue
was raised against Gilling.

Numerous cases are cited by appel-
lant holding that by going to trial on
new matter alleged in the answer with-
out a reply thereto, a reply is waived
even in states where the statute pro-
vides for one. If this be the rule or
ordinarily in actions between a
plaintiff and defendant or where
by cross-complaint new mat-
ter is alleged against a co-de-
fendant, and the latter appears
and introduces evidence in regard to it
the rule ought not to apply to cases
like the present one where the co-
defendant is in court for other pur-
poses and the answer is in reply to
the complaint and does not state the
new facts as a cross-complaint or
cause of action against the co-defend-
ant, is not served or replied to by him,
and he introduces no evidence con-
cerning it, and other parties partici-
pate in the trial. There being no ser-
vice upon Gilling, no demurrer, an-
swer, reply or testimony by him in re-
lation thereto, the allegations in the
answer of Washoe County Bank stat-
ing the facts in relation to the sale
and deed by the trustees which con-
trolled the court, and which are di-
rected against the complaint and not
against Gilling, are too slender a
thread to sustain the judgment against
him. As respondent contends, as
could be in court for some purpose
and not for others. He could be
as bound as far as process or proper al-
legations and demands had been serv-
ed upon him to the extent that he had
waived time or made other issue him-

self, without becoming liable further.
This is well illustrated by the finding
conclusion and direction of the court
that Gilling have judgment against
the Pollocks and Powell for the
amount due on his note and mortgage.
If the space left for this in the judg-
ment has been filled, or if the court
has made a decree of foreclosure in
favor of Gilling, both would have been
void against the Pollocks and Powell
for lack of service as is the judgment
against them based on the trustees
sale and it has been held that if one
of the parties to a judgment is not
bound, the other is not. They had
been served by the Savings Bank
with complaint or summons seeking
the foreclosure of the trust deed and
filed a demurrer. For the purpose of
that complaint and to the extent of its
demands they were in court or were
bound, but a judgment against them
for the amount or foreclosure of the
Gilling note and mortgage, when they
had not been served with pleading or
process regarding these would have
been void. The court has jurisdiction
of the subject matter of all questions
involved in this litigation, but of the
parties no further than they presented
themselves or were served with plead-
ings or process or waived service or
issues. If a complaint and summons
on a demand for one thousand dollars
is served upon a defendant, a judg-
ment for ten thousand would be void,
because the district court would have
jurisdiction over him to the extent
of only one thousand, while as far as
subject matter is concerned, it has
jurisdiction in any amount.

The facts were quite different and
the principal involved distinguishable
in Maples v. Geller, 1 Nev., 236.
There an answer which did not de-
mand judgment upon new matter was
filed to the complaint but not served.
The question was not between co-de-
fendants. The court said that the
filing of the answer gave it jurisdic-
tion over the defendant. Stripped of
dicta that decision properly deter-
mined that the filing of an answer to
the complaint without service pre-
vents a judgment for the plaintiff
by default. While here we hold that
property rights cannot be lost or ad-
judicated upon an answer or pleading
by a defendant seeking affirmative re-
lief on new facts against a co-defend-
ant without service or an issue or
waiver.

Questions are presented upon the
record in this case whether or not,
under the provisions of the practice
act of this State, the answers filed
by Martin Gilling and the Washoe
County Bank in the suit instituted by
the Farmers' and Mechanics' Savings
Bank, in so far as they sought affir-
mative relief against co-defendants,
are answers as contemplated by our
statute, or whether they are in fact
equitable cross-bills. If the latter,
whether or not, under the practice
act, they are permissible pleadings,
and further, if permissible pleadings,
whether or not the dismissal of the
plaintiff's complaint would not re-
quire the dismissal of the entire pro-
ceeding. These questions, however,
under the view we have taken of the
case are not deemed necessary to be
determined.

The judgment and order of the dis-
trict court are affirmed.

Talbot, J.
I Concur:
Norcross, J.
I Dissent:
Fitzgerald, C. J.
Filed Nov. 28, 1905.
W. G. Douglass,
Clerk.
By J. W. Legate,
Deputy.

MILLARD CATLIN.

Harling,
Freighting
Draying
Trunks and Baggage
taken to and delivered at
all trains.

ANNUAL STATEMENT

Of The State Life Insurance Company
Indianapolis, Ind.
Capital (paid up) none
Assets (admitted) 2,160,083 31
Liabilities, exclusive of capi-
tal and net surplus 2,615,497 63
Income
Premiums 4,046,901 77
Other sources 197,125 01
Total income, 1904 4,244,027 78
Expenditures
Losses 300,902 63
Dividends 65,240 11
Other expenditures 1,050,102 77
Total expenditures, 1904 1,416,245 56
Business, 1904
Risks written 22,276,143 00
Premiums thereon 805,648 06
Losses incurred 316,885 00
Nevada Business.
Risks written 10,000 00
Premiums received 2,852 43
Losses paid 5,000 00
W. S. Wynn Secretary.

Ho. For the West.

Tell your friends that the coalmin-
rates are going into effect March 1st,
1906 and expire May 15, 1906. The
rate from Chicago, Ill., \$31.00, St. Louis
Mo., New Orleans, La., \$30.00, San-
cruz Bluffs Ia., Sioux City, Ia., Omaha,
Neb., Kansas City, Mo., Mineola, Tex-
as and Houston Texas, \$25.00. Rates
apply to Main Line points in Califor-
nia and Nevada.